SUPREME COURT U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 267

JACK H. KELLY, PETITIONER,

vs.

VINCENT W. KOSUGA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 11, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 8] Jack Kelly

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Storage Paid to	Lot #	Car #	Storage Locations	State	Brand	Ordered Out Storage
— 1 10	48521 V	URT 4844	Blue Island	Wisconsin	Endeavor	
— 1 14	48550 V	WRC 14274	V	V	Earth Farms	
— 1 14	48552 V	URT 38141	V	V		
— 12 17	48586 V	WP 93259	V	V		
— 12 17	48585 V	PFE 68503	V	V		
— 12 28	48615 V	URT 38499	V	V	B & B	
— 12 31	48643 V	MOT 10947	V	V	Palmyra	
12 27	H9837	FGE 57659	G Hammond	V		
12 21	H9819	FGE 34846	V	Indiana		
— 1 2	48441	FGE 28912	Blue Island	Michigan		
1 15	H9796	WFE 68014	G Hammond	V		
1 1	H9910	FGE 56527	V	V		
1 2	73273	ART 35048	Central-Sang	Iowa	Pride of Iowa	
— 1 6	48472	WWX 70307	Blue Island	V	Fertile Grown	
12 26	H9856	ART 26101	G Hammond	V		

[fol. 9] EXHIBIT "B" TO COMPLAINT

WESTERN UNION

1956 FEB 16 PM 5 17

nl

JACK KELLY
% KELLY-BLACK CO.
110 N. FRANKLIN ST.
CHICAGO 6, ILL.

STORAGE ONIONS YOU PURCHASED FROM ME ON 12-17-55 NOW SHOWING DETERIORATION. YOU AGREED TO ORDER OUT OF CHICAGO STORAGE AND PAY FOR THESE ONIONS DURING JANUARY AND EARLY FEBRUARY 1956. PRESENT CONDITION OF ONIONS REQUIRE IMMEDIATE ACTION. DEMAND PAYMENT BY 2-20-56 AND WILL SURRENDER NEGOTIABLES UPON RECEIPT OF PAYMENT.

VINCENT KOSUGA

EXHIBIT "C" TO COMPLAINT

VINCENT KOSUGA
110 North Franklin Street
Chicago, Illinois

February 16, 1956

Mr. Jack Kelly
110 North Franklin Street
Chicago, Illinois

Dear Mr. Kelly:

On December 17, 1955, you purchased from me 50 cars of onions in storage at Chicago. As you know, some of these onions had been in storage since November, and are now beginning to show some deterioration.

[fol. 10] It was our agreement that you were to pay $300.00 per car cash, $200.00 per car on or before January 10, 1956, with the balance including all storage charges accrued to be paid when you ordered your onions out of storage. Further, that you would order your onions out of storage in substantial quantities during January and early February, 1956, which you have not done.

In view of the present condition of these onions, it appears that to hold them in storage for any further period of time may result in their total loss. Therefore, I demand payment of the amount due me for these onions on or before February 20, 1956. Upon receipt of payment, I will surrender the negotiable warehouse receipts to you.

Yours very truly,

Vincent Kosuga

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Print

IN THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

22

No. 12,190

26

JACK H. KELLY, Defendant and Appellant,

27

vs.

30

30

VINCENT W. KOSUGA, Plaintiff and Appellee.

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32

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATE
32 FOR THE NORTHERN DISTRICT OF ILLINOIS,
33 EASTERN DIVISION

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1956

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59 1957

60 Mar. 22. Amended answer.

Mar. 22. Motion to strike defense and reply to amend answer.

Mar. 22. Order giving leave to defendant to file amend answer and giving leave to plaintiff to file m tion to strike defense and reply to answer.

Apr. 24. Memorandum opinion on motion to strike affirmative defenses.

Apr. 24. Order granting plaintiff's motion to strike affirmative defenses.

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Aug. 22. Motion for summary judgment and affidavit in support thereof.

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Oct. 22. Notice of appeal.

[fol. 3]

In United States District Court

Complaint—Filed September 11, 1956

Vincent W. Kosuga, plaintiff, by his attorney, Lee A. Freeman, complains of Jack H. Kelly, defendant, and alleges:

1. Plaintiff is a citizen of the State of New York and defendant is a citizen of the State of Illinois. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

2. At various times on and prior to December 17, 1955, defendant sought to purchase quantities of onions which were then in store in Chicago, and owned by plaintiff and others. Pursuant thereto, defendant initiated, arranged for and attended meetings with plaintiff to negotiate such purchases.

3. On or about December 17, 1955, defendant purchased from plaintiff and plaintiff sold to defendant, fifty (50) cars of U. S. No. 1 grade Yellow Globe Onions in Chicago storage at $960.00 per car, for a total of $48,000.00, plus storage charges incurred after such sale. The specific cars of onions so purchased were selected by defendant. The terms of said purchase and sale provided for an initial cash payment of $300.00 per car, a second payment by January 10, 1956 of $200.00 per car and the balance of $460.00 per car, plus storage charges incurred, to be paid when the defendant ordered the car of onions to be released from storage. A memorandum of said agreement of purchase and sale is contained in the invoice issued to defendant; a true and correct photostatic copy thereof is attached hereto as Exhibit "A" and by this reference made a part hereof.

4. Defendant has paid to plaintiff the following sums in part payment of said purchase of onions:

On or about December 22, 1955	$7,500.00
On or about January 18, 1956	5,000.00

[fol. 4] Defendant has refused and does refuse to pay the balance due on said purchase price of $48,000.00 (less an allowance of $35.20 for shortage) although plaintiff has made demand therefor.

5. Storage charges in the amount of $5,082.00 have been incurred by plaintiff since the sale of said onions to defendant. Defendant has refused and does refuse to pay said storage charges although plaintiff has made demand therefor.

6. From time to time subsequent to the purchase of said fifty (50) cars of onions, defendant withdrew and sold or utilized thirteen (13) cars of said onions without making payment therefor as was required by defendant's agreement of purchase, although plaintiff has made demand therefor.

7. The onions purchased by defendant are perishable agricultural commodities which may be stored only for a reasonable period of time. On February 16, 1956, plaintiff advised defendant by telegram and letter that the onions so purchased in Chicago storage were showing deterioration and demanded that defendant withdraw said onions from storage and make full payment therefor, including storage charges, as provided by the agreement between the parties. Defendant, while acknowledging his obligations under the agreement, refused to withdraw said onions from storage at that time. True and correct copies of the telegram of February 16, 1956 from plaintiff to defendant, of the letter of February 16, 1956 from plaintiff to defendant and of the telegraphic answer of February 20, 1956 from defendant to plaintiff are attached hereto, marked Exhibits "B", "C" and "D", respectively, and by this reference made a part hereof.

8. On or about March 9, 1956, defendant repudiated his agreement of purchase of said onions. After due notice to defendant, on and after March 19, 1956, plaintiff used his best efforts to mitigate the damages involved by selling and disposing of said onions for the account of defendant, and plaintiff did so sell and dispose of the thirty-seven (37) cars of onions sold to defendant and remaining in storage at the

[fol. 5] best price available. There was realized from the sale of such onions a total sum of $3,204.00, which represented the then fair market value of said onions.

9. There is now due and owing to the plaintiff on account of said purchase and sale of fifty (50) cars of onions, a balance of $37,342.80, computed as follows:

Purchase price of 50 cars @ $960.00 per car		$48,000.00
Less adjustment for shortage		35.20
		$47,964.80
Add storage charges incurred subsequent to sale		5,082.00
Total due		$53,046.80
Less:		
Amount paid by defendant	$12,500.00	
Amount realized by plaintiff in liquidation of onions for account of defendant	3,204.00	15,704.00
Balance due and owing		$37,342.80

Wherefore, plaintiff prays that judgment be entered in his favor and against defendant in the sum of $37,342.80, together with interest at the rate of 5% per annum from the date of demand, and costs of this action.

Vincent W. Kosuga, Plaintiff, By Lee A. Freeman, His Attorney.

Dated: September 10, 1956.

Lee A. Freeman, 105 S. LaSalle Street, An. 3-6939, Chicago, Illinois.

[fol. 6] EXHIBIT "A" TO COMPLAINT

Vincent Kosuga
110 No. Franklin
Chicago, Illinois

Invoice Date Jan. 5, 1956
Refer to Invoice No. (6)

Sold to Jack Kelly
Parma, Michigan

21	Car	Illinois	Onions
11	"	Minn	Onions
11	"	Wisc	"
1	"	Ind.	"
3	"	Mich	"
3	"	Iowa	"
Total 50			

@ 960.00 per car = $48,000.00
Less advance = 7,500.00

$40,500.00

Terms:—(1) Jan 10—$200 more per car due.

(2) Balance due on your order to release from storage.

(3) Storage information on next sheet.

[fol. 7]

Jack Kelly

Page 1

Storage Paid to	Lot #	Car #	Storage Locations	State	Brand
12 31	S-1317		Dakota Chief	Illinois	All American
1 6	S-1329		V	V	
1 2	S-1334		V	V	
1 12	73005		Central-Sang	V	
1 13	73010		V	V	
1 15	73031		V	V	
— 12 20	48287 V		Blue Island	V	
— 12 19	48281 V		V	V	
— 12 18	48253 V		V	V	
— 12 18	48252 V		V	V	
— 12 20	48276 V		V	V	
12 23	S1364		Dakota Chief	V	
12 25	73085		Central-Sang	V	
— 1 2	48321 V		Blue Island	V	
1 10	73157		Central-Sang	V	
— 1 12	48341 V		Blue Island	V	
— 1 13	48346 V		V	V	
1 13	73192		Central-Sang	V	
— 12 17	48374 V		Blue Island	V	
— 1 16	48353 V		V	V	
— 12 17	48367 V		V	V	
— 1 2	48440 V	MOT 10279	V	Minnesota	North Star
— 1 2	48427 V	ART 50912	V	V	Northland
— 1 6	48461 V	WRC 19123	V	V	V
— 1 7	48489 V	ART 18315	V	V	Windmill
1 8	73302	WRC 16042	Central-Sang	V	North Country
1 15	H9792	PFE 47303	G Hammond	V	
— 1 16	48577 V	WRC 18010	Blue Island	V	
12 31	H9890	MDT 2210	G Hammond	V	
— 12 29	48619	MDT 10650	Blue Island	V	Paul Jones
12 31	H-9882	FGE 59027	G Hammond	V	Coronet
— 12 31	48638	WP 93038	Blue Island	V	50# Brand
— 1 2	48432 V	FGE 32267	V	Wisconsin	Yellow Bird
— 1 6	48466 V	URT 38731	V	V	Endeavor
— 1 8	73311	URT 81559	V	V	Delevan

EXHIBIT "D" TO COMPLAINT

WESTERN UNION

TELEGRAM

1956 FEB 20 PM 5 17

CHO 82 PD—CHICAGO ILL 20 452PMC
VINCENT KOSUGA
110 NORTH FRANKLIN ROOM 1210

OUR AGREEMENT DOES NOT PROVIDE THAT ONIONS BE WITHDRAWN FROM STORAGE IN SUBSTANTIAL QUANTITY BY EARLY FEBRUARY. WE INTEND TO ABIDE BY THE ORIGINAL AGREEMENT AND WE EXPECT YOU TO DO LIKEWISE.

JACK KELLY

[fol. 11]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed October 19, 1956

Now comes the defendant, Jack H. Kelly, by his attorney, Joseph W. Louisell, and for his Amended Answer to the Complaint heretofore filed, and shows unto this Honorable Court as follows:

1. Answering the allegations contained in paragraph 1 of the Complaint, the same are admitted.

2. Answering the allegations contained in paragraph 2 of the Complaint, the defendant denies that he sought to purchase quantities of onions which were owned by the plaintiff and others; further answering said paragraph, the defendant admits that he attended several meetings at which the plaintiff and others were present held in the City of Chicago, Illinois in November and December of 1955; that such meetings were called at the instigation of the plaintiff, but defendant admits that at the request of the plaintiff he advised certain others of the time and place set for such meetings.

3. The defendant denies the allegations contained in paragraph 3 of the Complaint as therein set forth. He

admits that on or about December 17, 1955 he, acting for and on behalf of Kelly Farms, a co-partnership located at Jackson, Michigan, of which the defendant is a co-partner, agreed with the plaintiff and the plaintiff's associate, one Sam Siegel, as a part of an over-all program to purchase from the plaintiff and the same Sam Siegel fifty (50) cars of onions in Chicago cold storage at the price and upon the terms alleged by the plaintiff in paragraph 3, of the Complaint;

Further answering said paragraph 3 of the Complaint, this defendant says that his commitment to accept 50 cars of onions was but one facet of an agreement entered into between the plaintiff and the aforesaid Sam Siegel on the one hand and the defendant and other persons who [fol. 12] dealt in or grew onions on the other hand, whereby the latter agreed to purchase a total of 287 carloads of onions in consideration of the promise then and there made by the plaintiff and his associate, Sam Siegel, who then represented themselves to be the owners of additional large supplies of onions both in cold storage in Chicago and elsewhere stored in the country not to deliver any of the onions so owned, held or controlled by them upon the futures market for the balance of the '55-'56 trading season.

Defendant further avers that all of the parties then and there further agreed that, for the purpose of creating a false and fictitious market condition, none of the parties entering into the agreement would deliver any of the onions then owned and held by the plaintiff and his associate, Sam Siegel which, under the terms of the agreement, were to be sold to the defendant or the others entering into said agreement or to be retained by the plaintiff and his associate, Sam Siegel, upon the futures market for the balance of the trading season.

4. Answering the allegations contained in paragraph 4 of the Complaint, the same are admitted;

Further answering, the defendant avers that he has refused to pay the balance of the purchase price for the reasons more fully set forth hereinafter in that section of the Amended Answer denominated as "Affirmative De-

fenses" and in that portion of the Amended Answer denominated as "Counter Claim", that said agreement between the plaintiff and the defendant is null and void as being contrary to public policy and as being violative of the Anti-Trust provisions of the laws of the State of Illinois, a true copy of which is annexed hereto as defendant's Exhibit I and made a part hereof as though set out in full, as being violative of the Anti-Trust provisions of the laws of the United States, specifically of Section 1 of Title 18 of the United States Code, and as being violative of Section 13 of Title 7 of the United States Code, and for the further reason that if said agreement is [fol. 13] legal, the plaintiff breached the agreement by delivering large quantities of onions on the futures market during the balance of the 1955-1956 trading season.

5. Answering the allegations contained in paragraph 5 of the Complaint, the defendant neither admits nor denies that storage charges in the amount of $5082.00 have been incurred by the plaintiff for lack of knowledge in the premises and, accordingly, the plaintiff is left to his strict proofs;

Further answering, the defendant admits that he has refused and does refuse to pay the storage charges although plaintiff has made demand therefor, for the reasons set forth hereinafter under the heading of "Affirmative Defenses" and "Counter Claim".

6. Answering the allegations set forth in paragraph 6 of the Complaint, the defendant admits that he withdrew thirteen (13) of the 50 carloads of onions ordered by him, but he specifically denies that he is required to pay any additional sums of monies to the plaintiff for the reasons hereinafter more fully set forth in the "Affirmative Defenses" and "Counter Claim".

7. Answering the allegations contained in paragraph 7 of the Complaint, the defendant admits that the onions purchased by the defendant are perishable agricultural commodities which may be stored for a reasonable period of time only;

Further answering, the defendant admits that a demand was made upon him by the plaintiff on February 16, 1956 to withdraw said onions from storage and to make full payment therefor, but the defendant denies that he acknowledged his obligation under the agreement, the truth of the matter being that the defendant was not obligated to withdraw any amounts of onions in February or any other time, but rather, was only obligated, when he did withdraw the onions from storage, to pay the balance due and owing on said onions, if it be assumed that said agreement was lawful.

[fol. 14] 8. Answering the allegations contained in paragraph 8 of the Complaint, the defendant admits that on or about March 9, 1956 he notified the plaintiff that he would withdraw no further onions from storage and that he would pay to plaintiff no further sums of monies for the reasons that said agreement, being a restraint upon trade and an effort to fix prices, was null and void

Further answering, the defendant neither admits nor denies that the plaintiff used his best efforts to mitigate damages and the defendant neither admits nor denies that the plaintiff realized the sum of $3,304.00 from the sale of such onions and the defendant neither admits nor denies that the sum of $3,204.00 was the fair market value of said onions for the reason that the defendant has no knowledge in the premises and thus leaves the plaintiff to his strict proofs.

9. Answering the allegations contained in paragraph 9 of the Complaint, the defendant denies, for the reasons hereinafter more fully set forth under the headings of "Affirmative Defenses" and "Counter Claim", that he owes any sums of money, whatsoever, to the plaintiff.

Affirmative Defenses

The defendant hereby gives notice to the plaintiff that upon a hearing of said cause the defendant will adduce evidence in support of the following affirmative defenses:

1. That the plaintiff, Vincent W. Kosuga and one Sam Siegel during the months of November and December of

1955 had in their possession or control approximately 600 carloads of onions in cold storage in the area of Chicago, Illinois, and that in addition thereto the plaintiff and said Sam Siegel had approximately 400 carloads of onions in storage in the country and that the said plaintiff and Sam Siegel on various occasions commencing in the latter part of November, 1955 and continuing to and until on or about the 17th day of December, 1955, represented to this defendant and diverse other growers of onions that unless [fol. 15] this defendant and other persons purchased a large portion of the onions owned by the plaintiff, the plaintiff and Sam Siegel would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions. That this defendant and certain other growers of onions in attendance at the various meetings held at the initiative of the plaintiff and his associate Sam Siegel were the owners of large quantities of onions in the country, which they customarily sold through normal trade channels. That this defendant as well as the other onion growers feared that the delivery on the futures exchange of a large quantity of storage onions would seriously depress both the futures and the cash onion market to their irreparable loss and damage.

2. That the plaintiff and Sam Siegel did call three meetings during the months of November and December, 1955 for the express purpose of determining whether this defendant, Jack H. Kelly, Veril Baldwin, Lacerne Dickson, Lyle Jordan, William Gehring, Mike Minardo, either in their individual or representative capacities as officers or agents for individuals, firms or corporations, would agree to take and merchandise a portion of 600 carloads of onions then either owned or controlled by the plaintiff and Sam Siegel in cold storage in Chicago.

3. That at the second of these meetings, which was held on December 11, 1955, in Chicago, Illinois, the plaintiff and Sam Siegel agreed with this defendant and with the others present at the meeting that if they would purchase a portion of said 600 carloads of onions, the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the '55-'56 trading season.

4. That at said meeting and at a subsequent meeting held on December 17, 1955 this defendant and other persons either in their individual or representative capacities, agreed to purchase from the plaintiff and Sam Siegel two hundred eighty-seven (287) carloads of onions on terms similar to those set forth in Exhibit "A" which is attached to the Complaint.

[fol. 16] 5. That the avowed and express object of the agreement was to manipulate the market price of onions and to stabalize (sic) said price and, if possible, increase said price.

6. That the above mentioned contract, combination and conspiracy, since it had as its object the purpose of fixing prices and limiting the amount of onions to be sold in the State of Illinois, was null and void and unenforceable under the Anti-Trust laws of the State of Illinois, specifically Sections 15.62, 15.66 and 15.67 of the Jones Illinois Statutes Annotated, a true copy of which Sections is annexed hereto as defendant's Exhibit I and made a part hereof as though set out in full.

7. That the aforesaid contract, combination and conspiracy was in restraint of trade or commerce among the several states and thus is null and void under the provisions of the Sherman Anti-Trust Act, Sec. 1 of Title 15 of the United States Code inasmuch as said onions which were the subject of said agreement and contract were a part of interstate commerce.

8. That the said agreement, combination and conspiracy to fix prices and to manipulate the market price of onions in interstate commerce, as defined by Section 3 of Title 7 of the United States Code was in violation of Section 13 of Title 7 of the United States Code.

9. That inasmuch as the agreement upon which the plaintiff bases his cause of action is null and void and unenforceable, this Court cannot extend its aid to any parties thereto who are in pari delicto, but rather, must leave the parties in the present status quo.

Counter Claim

1. The defendant is and for a long time heretofore has been a commercial grower of onions in the States of Michigan and Wisconsin and that during the year of 1955 his various farms did produce great amounts of onions.

2. That on or about December 11th and/or December 17, 1955 the plaintiff for a good and valuable consideration, [fol. 17] namely the promise of the defendant to purchase fifty (50) carloads of onions from the plaintiff, did promise to and agree with the defendant that he, the plaintiff would not deliver on the futures market any onions whatsoever during the balance of the '55-'56 trading season.

3. That notwithstanding the defendant had fulfilled all of his obligations under said agreement, the plaintiff did breach his contract and agreement by selling large numbers of futures contracts of onions on the Chicago Mercantile Exchange during the ensuing trading months of the '55-'56 onion futures season.

4. That the plaintiff further breached and violated the agreement of December 11 and December 17, 1955 in that he and the said Sam Siegel had agreed with the defendant and the other growers and shippers of onions there present that they, the plaintiff and said Sam Siegel would not disrupt the onion cash market by delivery of unusual quanties (sic) of onions on the cash market or by selling onions in the country below the then prevailing price but that the plaintiff and the said Sam Siegel did throughout the balance of the '55-'56 trading season delivered (sic) large quantities of onions on the cash market and also sold the same in the country below the established purchasing price.

5. That the effect and direct result of the plaintiff's breach of contract, as above set forth, was a glutting of the cash market so that the price of onions on the market declined.

6. That the plaintiff was a heavy trader in futures on the Chicago Mercantile Exchange in the months of November and December of 1955 and that at the time he entered into the agreement with the defendant and others

as above set forth, he represented to the defendant and others there present that he would support the long side of the market. That notwithstanding such representations and the reliance thereupon by the defendant the plaintiff went short the futures market and caused a serious decline in both the futures and the cash market for onions.

[fol. 18] 7. That the defendant as the owner of a large supply of onions in the country, suffered damages in consequence of the forced and fictitious decline of the onion market, resulting from the plaintiff's conduct as aforesaid in the amount of Seventy-five Thousand ($75,000.00) Dollars.

Wherefore, defendant prays entry of a judgment in the sum of Seventy-five Thousand ($75,000.00) Dollars plus costs and attorney fees.

/s/ Joseph W. Louisell, Attorney for Defendant,
2366 Penobscot Building, Detroit 26, Michigan.

Dated: Detroit, Michigan, March 7, 1957.

Exhibit I

JONES ILLINOIS STATUTES ANNOTATED

15.62. TRUSTS, POOLS AND COMBINES DEFINED. CONSPIRACY] Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: If any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State or any partnership or individual or other association of persons whatsoever, shall create, enter into, become a member of or party to any pool, transaction, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article or merchandise or commodity or shall enter into, become a member of or a party to any plan, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity

or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or in-
[fol. 19] dividual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act.

15.66 DECLARES CONTRACTS AND AGREEMENTS IN VIOLATION OF THIS ACT VOID] §5. Any contracts or agreements in violation of any provisions of the preceding Sections of this Act shall be absolutely void.

15.67 EXEMPTS PURCHASERS OF COMMODITIES, PRODUCED OR MANUFACTURED IN VIOLATION OF THIS ACT, FROM PAYMENT.] Any purchasers of any article or commodity from any individual, company or corporation transacting business contrary to any provisions of the preceding sections of this Act shall not be liable for the price or payment of such article or commodities, and may plead this Act as a defense to any suit for such price or payment.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE DEFENSE AND REPLY TO AMENDED ANSWER—Filed November 30, 1956

FIRST

Plaintiff moves the court for an order striking from the defendant's amended answer the following paragraphs set forth therein as defenses to the action brought, on the ground that said defenses fail to state a legal defense to the claim set forth in plaintiff's complaint:

1. The entire "Affirmative Defenses".

2. From the amended answer.

A. The allegation in paragragh 3 that the parties further agreed for the purpose of creating a false and fictitious market condition, that none of the parties would deliver onions purchased or held on the futures market for the balance of the trading season.

[fol. 20] B. The allegation in paragraph 4 that the agreement between the plaintiff and defendant is null and void as being contrary to public policy, violation of the antitrust provisions of the laws of the State of Illinois and the laws of the United States, and violative of Section 13 of Title 7 of the United States Code.

SECOND

Plaintiff in reply to the amended answer and as answer to the affirmative defenses and counterclaim filed by the defendant herein, states as follows:

1. Denies the allegations in paragraph 3 of said amended answer that Sam Siegel was an "associate" of the plaintiff or was in any legal way connected, associated or acted in concert with plaintiff in connection with the transactions here involved.

Denies that plaintiff agreed by himself or in conjunction with any other person not to deliver onions on the futures market for the balance of the trading season for the purpose of creating a false and fictitious market condition.

Replying further, plaintiff avers that the defendant was a substantial speculator on the long side of the market in onion futures and actual onions during November and December, 1955; that defendant sought to purchase from the plaintiff a portion of plaintiff's actual onions held in Chicago; that plaintiff was willing to and did actually sell to the defendant fifty carloads of onions as alleged, but that defendant imposed as a condition of said purchase a requirement that the plaintiff would not deliver his remaining holdings of onions on the futures market for the balance of the futures trading season but instead would merchandise such onions in normal channels of trade.

2. Denies the legal conclusions contained in paragraph 4 of the amended answer that the purchase and sale of the onions here involved is null and void as contrary to public policy, in violation of the antitrust provisions of the laws of Illinois and the laws of the United States, and in [fol. 21] violation of Section 13 of Title 7 of the United States Code. Plaintiff further denies that he breached any agreement with the defendant.

3. Replying to the allegations in paragraph 8 of the amended answer, plaintiff states that the defendant did on or about March 9, 1956, notify plaintiff that he would not pay plaintiff the balance due on his contract to purchase fifty carloads of onions; that the market price of onions had progressively declined since the purchase made on December 17, 1955, and that defendant repudiated his contract solely and entirely because of such decline in the market price of the onions purchased.

IN ANSWER TO THE AFFIRMATIVE DEFENSES

4. Plaintiff denies any association with or action in combination or in concert with Sam Siegel with respect to any of the transactions here involved as alleged or implied in paragraphs 1, 2, 3 and 4 of the affirmative defenses.

5. Denies the allegations in paragraph 1 of the affirmative defense that plaintiff on various occasions or at any time represented to the defendant and divers other growers of onions that unless defendant and others purchased a large portion of the onions owned by plaintiff, he would deliver large quantities of onions on the futures exchange for the avowed purpose of depressing both the futures and cash market price of onions; denies that the various meetings referred to were held at the initiative of the plaintiff; answering further, plaintiff is without knowledge of the truth or falsity of the allegations with respect to Sam Siegel or the feelings and fears of other onion growers not parties to this litgation (sic) and, therefore, demands strict proof thereof.

6. Denies the allegation in paragraph 2 of the affirmative defenses that plaintiff called three meetings or any meeting during the months of November and December, 1955, for the purposes therein indicated.

[fol. 22] 7. Denies the allegation in paragraph 3 of the affirmative defenses and states in answer thereto that defendant was a substantial speculator on the long side of the market in onion futures and actual onions during November and December, 1955; that defendant sought to pur-

chase from the plaintiff a portion of plaintiff's actual onions held in Chicago; that plaintiff was willing to and did actually sell to the defendant fifty carloads of onions as alleged, but that the defendant imposed as a condition of said purchase a requirement that the plaintiff would not deliver his remaining holdings of onions on the futures market for the balance of the futures trading season but instead would merchandise such onions in normal channels of trade.

8. Denies the allegations in paragraphs 5, 6, 7, 8 and 9 of the affirmative defenses.

In Answer to the Counterclaim Herein Filed

9. Plaintiff denies the allegations of paragraph 2 of the counterclaim that in consideration of the purchase by defendant of fifty carloads of onions that plaintiff promised and agreed that he would not deliver on the futures market any onions whatsoever during the balance of the 1955-56 trading season.

10. Denies the allegations in paragraph 3 of the counterclaim that defendant had fulfilled all of his obligations under the agreement with the plaintiff and denies that plaintiff breached any contract or agreement with defendant in the manner indicated or in any manner.

11. Denies the allegations in paragraphs 4, 5, 6 and 7 of the counterclaim.

Wherefore, plaintiff, Vincent W. Kosuga prays that the defenses specified be stricken from the defendant's pleadings for failing to state a legal defense to the claim set forth in plaintiff's complaint and that judgment be entered [fol. 23] in favor of plaintiff, Vincent W. Kosuga, and against the defendant, Jack H. Kelly, as prayed.

/s/ Lee A. Freeman, /s/ A. Bradley Eben, Attorneys for Plaintiff.

Lee A. Freeman, 105 S. LaSalle Street, Chicago, Illinois.

A. Bradley Eben, 11 S. LaSalle Street, Chicago, Illinois.

March 22, 1957.

In United States District Court

Memorandum Opinion on Motion to Strike Affirmative Defenses—April 24, 1957

Complaint was filed September 11, 1956 under Section 1332, Title 28 of the United States Code to recover the balance of $37,342.80 due on a contract for the sale of 50 carloads of onions. Defendant answered, setting up as Affirmative Defenses, alleged violation of the Illinois Antitrust Law, (Jones. Ill. Stats. Ann. Secs. 15.62, 15.66 and 15.67), the Federal Antitrust Act, (15 U. S. C. Sec. 1) and the Commodity Exchange Act (7 U. S. C. Sec. 13), on the ground that in consideration for the purchase of these 50 cars of onions, plaintiff had agreed not to deliver the remainder of his onions on the futures market. This condition it is asserted had as its object the manipulation, stabilization and if possible increase in onion market prices.

Defendant further alleges that if the agreement is legal, then plaintiff was guilty of a breach by delivering onions on the futures market, by selling futures contracts and selling actual onions below established prices. Defendant, for these alleged breaches, counterclaims for $75,000.00.

[fol. 24] Plaintiff filed a motion to strike the Affirmative Defenses based upon alleged violations of the antitrust laws and the Commodity Exchange Act, and a reply denying the alleged breaches asserted in the counterclaim.

Presented for our decision is the motion to strike the defendant's Affirmative Defenses. The facts as admitted by the pleadings are:

Plaintiff owned actual onions in Chicago and in the country. On December 17, 1955 defendant, as one of several individuals, purchased 50 carloads of such onions for $960.00 per car or a total of $48,000.00, plus storage charges. The purchase agreement provided for an initial payment of $300.00 per car, a second payment of $200.00 per car due January 10, 1956 and the balance of 460.00 per car plus storage due when defendant ordered the cars out of storage. As a condition to this purchase, plaintiff agreed not to deliver any of his remaining onions on the futures market for the remainder of the season, but instead to merchandise such onions in normal commercial trade channels.

Defendant paid $12,500.00 on account of his purchase, and from time to time withdrew from storage and utilized 13 carloads of onions, but failed to make payment therefor as required. Significantly, subsequent to the purchases, the market price of onions progressively declined.

Onions are a perishable commodity which can be stored only for a reasonable period. On February 16, 1956, plaintiff advised that the onions purchased were showing deterioration, and requested defendant to take the onions and make full payment thereon. Defendant refused to accept the onions at that time, but acknowledged the validity and enforceability of his purchase agreement.

On March 9, 1956 defendant repudiated the agreement claiming it was illegal in violation of antitrust laws and the Commodity Exchange Act. Plaintiff, after notice, sold the 37 cars of onions remaining from defendant's purchase, and credited defendant with the amount realized in mitigation of damages.

This is an action to enforce payment for onions sold to and received by defendant, at a price that is not objected to as unreasonable or excessive. The contract of purchase [fol. 25] was complete in itself and contains reciprocal considerations moving between the parties. The condition of non-delivery which is asserted as a violation of the antitrust laws and the Commodity Exchange Act is not an inherent part of the sale which is here sought to be enforced. Plaintiff does not seek to enforce that provision. A judgment, if rendered for the plaintiff, would not afford judicial aid to the enforcement of an allegedly illegal condition. In the present posture, our decision on the motion to strike is governed by the principles announced in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 551; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 172-3; *Small Co.* v. *Lamborn Co.*, 267 U. S. 238; and *Bruces' Juices, Inc.* v. *American Can Co.*, 330 U. S. 743.

In the *Wilder* case the Supreme Court upheld the rejection of a defense of alleged violation of the antitrust laws when asserted in an action to recover the price of goods sold. There the purchase agreement contained conditions allegedly restrictive of competition. The court expressed the rule controlling in this proceeding on pages 172 and 173 as follows:

"* * * the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result * * * "

"The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percent- [fol. 26] age of profits upon the condition of dealing exclusively with the refining company for the following year, and the clause to the effect that the goods were bought by the manufacturing company for its own use, and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

We are further impelled to our conclusion by the fact that the federal laws invoked provide various sanctions in the event of violation, but do not make uncollectibility of the purchase price for goods sold one of those sanctions. The remedies provided by the Federal Antitrust Acts or the Commodity Exchange Act are exclusive, and do not afford defendant the affirmative defense here asserted: *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co., supra, Bruce's Juices, Inc.* v. *American Can Co., supra.*

Furthermore, the non-delivery condition if regarded as illegal, would not insulate defendant from the obligation of paying the agreed price for goods purchased and received. The illegal condition or covenant in such circumstances would be separated from the lawful promise for a lawful consideration and the latter agreement enforced: *Cincin-*

nati etc. Packet Co. v. *Bay,* 200 U. S. 179; *U. S. Hoffman Machinery Corp.* v. *Valeteria Cleaners, Inc.,* 143 F. Supp. 797 (D. C. Minn.).

What we have said concerning the defense based on alleged violation of the Federal Antitrust Acts serves also to dispose of the defense of alleged violations of the Illinois Antitrust Law—if that state act could be said to be applicable. Defendant asserts that the transactions involved are in interstate commerce and therefore the question naturally arises whether the state antitrust law is even applicable.

Plaintiff also seeks to strike the Affirmative Defenses as insufficient in law by asserting that the non-delivery condition is not an unlawful restraint of trade or manipulative device. Plaintiff agreed, as a condition to this sale of onions, to merchandise the remainder of his onions in nor- [fol. 27] mal trade channels and not to deliver them on the futures market during the remainder of the current onion season. Deliveries on futures market may have temporary price upsetting consequences which may interfere with defendant's efficient and profitable disposition of the onions he had purchased. The condition imposed by defendant and agreed to by plaintiff was a reasonable restriction to assure defendant the enjoyment of the legitimate fruits of his contract of purchase, and to protect him from a possible derogation in the value of the property bought. This condition does not constitute an illegal restraint of trade proscribed in the Federal or Illinois antitrust laws: *U. S.* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (C. A. 6); *Cincinnati etc. Packet Co.* v. *Bay, supra; D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co., supra.*

Nor is the non-delivery condition violative of the provisions in the Commodity Exchange Act against manipulation of markets and commodity prices. Manipulation as contemplated under that act may be defined as the creation of an artificial price by planned and deliberate action. The devices commonly employed to achieve manipulation are deceit, trickery through the spread of false market and economic rumors, concealment of market position, the violation of express anti-manipulative controls set forth in the Commodity Exchange Act, or other forms of fraud: *General Foods Corp* v. *Brannan,* 170 F. (2d) 220, 224, 231.

Defendant does not allege that the non-delivery condition was intended to achieve an artificial price or that plaintiff utilized or agreed to any manipulative device in the sale or merchandising of his onions. The Affirmative Defenses do not allege a manipulation as contemplated by and in violation of the Commodity Exchange Act.

Fifty carloads of onions were sold on December 17, 1955 on terms and conditions admitted by the pleadings. Defendant, however, seeks to avoid payment by the drastic step of asserting that he was a participant with the plaintiff in a market rigging operation. He is placed in a peculiar position by also asserting that plaintiff did not comply with the illegal conditions involved.

[fol. 28] It is obvious that this position was in no small part conceived after declines in market prices, made the purchases of onions unattractive and unprofitable. We will not lend our aid to the creation of windfall profits as thus contemplated.

We find the agreement of purchase and sale of fifty carloads of onions to be valid and binding, and the Affirmative Defenses asserted to be insufficient in law. The plaintiff's motion to strike is granted. An appropriate order will be entered.

.....

U. S. District Judge.

April 24, 1957.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO STRIKE AFFIRMATIVE DEFENSES—Filed July 11, 1957

You are hereby notified that Judge Igoe entered the following order on 4-24-57:

Plaintiff's motion to strike affirmative defenses is granted and said affirmative defenses are hereby stricken. Cause set for trial on June 17, 1957.

Roy H. Johnson, Clerk.

[fol. 29]

IN UNITED STATES DISTRICT COURT

MOTION FOR RECONSIDERATION OF ORDER GRANTING THE PLAINTIFF'S MOTION TO STRIKE "AFFIRMATIVE DEFENSES" CONTAINED IN DEFENDANT'S AMENDED ANSWER—
Filed July 11, 1957

Now comes the defendant, Jack H. Kelly, by one of his attorneys, Joseph W. Louisell, and moves this court to reconsider the order granting plaintiff's motion to strike the "Affirmative Defenses" contained in defendant's amended answer. The following grounds are relied upon in support of the instant motion.

1. That the court erred in determining that the condition of non-delivery was not an inherent part of the sale and that, accordingly, the defendant could not assert a violation of the Sherman Anti Trust Act and of the Commodity Exchange Act as a defense, the fact of the matter being, as indicated by the pleadings, that the contract of sale was made in pursuance of and in furtherance of a "price fixing" agreement, which was illegal per se and which cannot be enforced.

2. That the court erred in determining, notwithstanding the plain language of Sections 15.62, 15.66 and 15.67 of Jones Illinois Statutes Annotated, that the defendant could not plead the Illinois Anti Trust Act as a defense to any suit for the price or payment of any article or commodity secured from any individual transacting business in violation of the Illinois Anti Trust Act, even if it would be assumed *arguendo,* that a portion of the consideration for the purchase of the onions in question was legal. (Evans v. American Strawboard Company, 114 Ill. App. 415 (1904).)

3. That the court erred when it determined that the defenses of a violation of the Sherman Anti Trust Act and of the Commodity Exchange Act could not be asserted in [fol. 30] litigation in which the seller of a commodity is seeking the purchase price, the law being that the violation of said statutes may be asserted as a valid defense

where a suit is based upon an agreement which has as its object and effect the accomplishment of illegal ends which would be consummated by the judgment sought.

4. That the court erred when it determined that the non-delivery condition was not an unlawful restraint of trade or a manipulative device, it being axiomatic that a "price fixing" agreement is illegal per se, whether reasonable or not.

5. That the court erred when it determined that the defendant did not allege a valid defense in relying upon a violation of the Commodity Exchange Act for the reason that there was no allegation of a fraudulent practice upon the part of the plaintiff, the fact of the matter being that paragraph 5 of the "Affirmative Defenses" alleges a manipulation of the market price of onions and the Commodity Exchange Act explicitly holds such conduct to be illegal.

6. That this motion is filed at the present time because neither Mr. Joseph W. Louisell, nor Mr. Richard E. Gorman, counsel for the defendant, have ever received notice of the entry of an order on April 24, 1957, granting the plaintiff's motion to strike;

That Mr. Joseph W. Louisell was absent from his office from April 24, 1957 to June 12, 1957, but prior to his departure he instructed his associate, Ivan E. Barris, to handle the instant cause in his absence and, specifically, to be alerted to any communication from this court pertaining to the disposition of the plaintiff's motion to strike;

That on May 13, 1957, Ivan E. Barris, received a telephone call from a business associate of the defendant, one Mr. Black, who informed Ivan E. Barris that he had heard that this court had disposed of the motion to strike. That immediately upon receipt of said call, Ivan E. Barris, dispatched a letter over the signature of Joseph W. [fol. 31] Louisell to the Clerk of this Court, a true copy of which is annexed hereto and made a part hereof, as though set out herein in full;

That when no response whatsoever to the aforesaid letter was received from this court, Ivan E. Barris did place a long distance telephone call to the Clerk of this Court and did speak to a person who represented himself to be the Clerk of this Court;

That when Ivan E. Barris made inquiry as to the disposition of the aforesaid motion to strike, said person did positively and unequivocally represent to Ivan E. Barris that the motion had not been disposed of, that rumors to the contrary were false, and that the court was still taking under advisement the said motion to strike.

That on or about June 21, 1957, Joseph W. Louisell did receive notice that the instant cause had been re-set for trial on September 24, 1957, whereupon Joseph W. Louisell did call counsel for the plaintiff, Lee A. Freeman, who did state that the cause had been originally set for hearing on June 17, 1957; that he requested the court to adjourn the matter until September 24, 1957, and that he had received notice of the order granting motion to strike only a few days prior thereto;

That neither counsel for the defendant herein had ever received notice that the trial of the instant cause would be heard on June 17, 1957.

This motion is based upon the files and records of the instant cause and upon the affidavit of Joseph W. Louisell, the affidavit of Ivan E. Barris, and the affidavit of Richard E. Gorman.

Wherefore, defendant prays this honorable court to reconsider its order granting plaintiff's motion to strike certain affirmative defenses contained in defendant's [fol. 32] amended answer and that an order be entered denying said motion to strike.

/s/ Joseph W. Louisell, Attorney for Defendant,
2366 Penobscot Building, Detroit 26, Michigan.

Dated: June 28, 1957.

ATTACHMENT TO MOTION

Notice of Hearing

To: Lee A. Freeman, Attorney for Plaintiff, 105 So. LaSalle Street, Chicago 3, Illinois.

Please take notice that the annexed Motion for Reconsideration of Order Granting the Plaintiff's Motion to Strike "Affirmative Defenses" contained in Defendant's Amended Answer, copy of which was heretofore served upon you, will be brought on for hearing before the Honorable Michael L. Igoe, at his court room at the Federal Building, in Chicago, Illinois, on Friday the 12th day of July, 1957, at 2:00 o'clock in the afternoon or as soon thereafter as counsel may be heard.

/s/ Joseph W. Louisell, Attorney for Defendant, 2366 Penobscot Building, Detroit 26, Michigan.

[fol. 33] ATTACHMENTS TO MOTION

Affidavit

State of Michigan,
County of Wayne—ss.

Joseph W. Louisell, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein; that he has prepared the annexed Motion for Reconsideration of Order Granting the Plaintiff's Motion to Strike "Affirmative Defenses" contained in Defendant's Amended Answer; that the matters stated therein are true to the best of his knowledge except as to those matters therein stated to be upon information and belief, and as to it he believes it to be true.

/s/ Joseph W. Louisell.

Subscribed and sworn to before me this 28th day of June, 1957.

Eileen M. Mahoney, Notary Public, Wayne County, Michigan. My commission expires: February 14, 1959.

State of Michigan,
County of Wayne—ss.

Ivan E. Barris, being first duly sworn, deposes and says that he is an associate of Joseph W. Louisell; that when said Joseph W. Louisell departed for a period of 7 weeks from his office, commencing on April 24, 1957, he instructed the deponent to handle the matter of Kosuga v. Kelly and to, especially, keep alerted to the arrival of an order disposing of the plaintiff's motion to strike.

Deponent further sayeth that notice of the entry of an order disposing of said motion to strike was never received in the office of Porritt, Freud, Toppin & Louisell; that on May 13, 1957 your deponent received a telephone [fol. 34] call from one Mr. Black, a business associate of the defendant, during the course of which Mr. Black stated that he had heard rumors to the effect that said motion to strike had been decided adversely to the defendant; that thereupon your deponent wrote a letter to the Clerk of the United States District Court, a true copy of which is annexed hereto to the motion for reconsideration, and that no reply to such letter was ever received; that on or about May 20, 1957, your deponent put in a long distance call to Judge Igoe's Clerk and that a person representing himself to be said Clerk affirmatively represented to your deponent that the motion to strike had not been decided, that rumors to the contrary were false, and that the matter was still being held under advisement by the Court; that when Joseph W. Louisell returned to his office on June 12, 1957, and inquired as to the disposition of the motion to strike, your deponent did inform him as to what had transpired.

Further your deponent sayeth not.

/s/ Ivan E. Barris.

Subscribed and sworn to before me this 28th day of June, 1957.

Eileen M. Mahoney, Notary Public, Wayne County, Michigan. My Commission expires: February 14, 1959.

[fol. 35] Affidavit

State of Illinois,
County of Cook—ss.

Richard E. Gorman, being first duly sworn, deposes and says that he is one of the attorneys for the defendant herein; that he has never received from the United States District Court any notice pertaining to the disposition of the plaintiff's motion to strike the "Affirmative Defenses" in the defendant's amended answer and that he first received information concerning the disposition of said motion when he received a telephone call on or about June 21, 1957, from Joseph W. Louisell, who made inquiry of your deponent as to whether your deponent had received any notice of the entry of an order granting the motion to strike.

/s/ Richard E. Gorman.

Subscribed and sworn to before me this 28th day of June, 1957.

Doris M. Ronicke, Notary Public, Cook County, Illinois. My Commission expires: June 6, 1959.

[fol. 36] Exhibit to Motion

May 13, 1957

Clerk to Judge Igoe,
U. S. District Court,
United States Court House,
Chicago 4, Illinois.

Re: Kosuga v. Jack H. Kelly
No. 56-C-1502

Dear Sir:

I have been informed unofficially that the plaintiff's motion to strike the affirmative defenses of the defendant and a portion of the defendant's answer has been granted, but I have received no official notice thereof.

If my information is correct, and if Judge Igoe has written an opinion, I would be most appreciative if you could send a copy of the opinion to me, so that I may

take appropriate and timely measures to appeal the judge's order.

Yours very truly,

/s/ Joseph W. Louisell.

JWL:EMM

[fol. 37]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR RECONSIDERATION—
August 16, 1957

This cause coming on to be heard on the written motion of the plaintiff to strike certain defenses and pursuant to notice to all parties, and the court having heard the arguments of counsel and being advised in the premises,

It is hereby ordered:

1. That plaintiff's motion to strike the affirmative defenses alleged by the defendant is hereby granted.

2. That the allegations in paragraph 4 of the amended answer to the effect that the agreement of purchase of onions between the plaintiff and defendant is null and void as being contrary to public policy, violative of Section 13 of Title 7 of the United States Code are hereby stricken.

3. That the section of the amended answer entitled "Affirmative Defenses" is hereby stricken.

4. That the defendant's motion for reconsideration of the court's decision to grant the plaintiff's motion to strike certain affirmative defenses is hereby denied.

5. That the cause is set for trial on September 24, 1957.

Enter:

/s/ Igoe, Judge.

Dated: August 16, 1957.

[fol. 38]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed August 22, 1957

Plaintiff, Vincent W. Kosuga, by his attorneys Lee A. Freeman and A. Bradley Eben, moves the court for the entry pursuant to Rule 56 of the Federal Rules of Civil Procedure of a summary judgment in plaintiff's favor in the amount of $37,342.80, the relief demanded in the complaint, and a summary judgment dismissing the counterclaim filed herein by the defendant on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law and is entitled to dismissal of the defendant's counterclaim as a matter of law.

This motion is based upon:

(a) The complaint and amended answer filed in this cause; and

(b) The supporting affidavit of Don R. Black which is attached hereto.

Lee A. Freeman, A. Bradley Eben, Attorneys for Vincent W. Kosuga, Plaintiff.

Dated August 22, 1957.

Lee A. Freeman, 105 S. LaSalle Street, Chicago, Illinois. An. 3-6939.

[fol. 39] ATTACHMENT TO MOTION

Affidavit

State of Illinois,
County of Cook—ss.

Don R. Black, being first duly sworn on oath deposes and says that he is a resident of Winnetka, Illinois; that he and Jack Kelly are officers in the firm of Kelly-Black Company, a registered futures commission merchant and a clearing member of the Chicago Mercantile Exchange. Prior to 1955 and continuing to the spring of 1956, Vincent W. Kosuga

was a customer of the firm of Kelly-Black Company. During the period from December 17, 1955 to April 1956, affiant in his individual capacity and distinct from the Kelly-Black Company, maintained books and accounts for Vincent W. Kosuga of his sales of cash onions to various individuals, including the sale of 50 carloads of onions to Jack Kelly on or about December 17, 1955. The bills for storage and inspection charges paid after December 17, 1955 by Vincent W. Kosuga on account of such carlots of onions sold, were maintained by affiant. The following 50 carlots of onions sold to Jack Kelly incurred the indicated storage charges during the period from December 17, 1955 to March 12, 1956, which charges were paid by Vincent W. Kosuga:

[fol. 40]

Carlot Number	Storage Charge Incurred	Carlot Number	Storage Charge Incurred
S 1317	$126	73302	$126
S 1329	42	H 9792	84
S 1334	42	48577	84
73005	126	H 9890	84
73010	42	48619	126
73010	42	48619	126
48287	126	38638	126
48281	84	48432	126
48253	84	48466	126
48252	84	73311	84
48276	84	48521	42
S 1364	126	48550	42
73085	126	48552	126
48321	126	48586	84
73157	126	48585	84
48341	126	48615	126
48346	126	48643	126
73192	84	H 9837	84
48374	84	H 9819	126
48353	84	48441	84
48367	84	H 9796	84
48440	126	H 9910	126
48427	126	73273	126
48461	126	48472	126
48489	126	H 9856	126
		Total storage charges paid	$5,082.

On or about February 7, 1956, the following 13 carlots of onions were withdrawn from storage by Jack Kelly and sold to Campbell Soup Company:

S 1329	48252	48550
S 1334	48253	H 9837
73010	48276	48441
73031	H 9890	
48281	48521	

[fol. 41] In March 1956, the prices for cash onions stored in Chicago dropped substantially and difficulties were encountered in the merchandising of such onions due to the arrival in Chicago of fresh Texas onions. On March 19, 1956, Vincent W. Kosuga asked affiant if he knew of any buyers desiring Chicago storage onions. Pursuant to such request, affiant notified Mr. Kosuga that Campbell Soup Company was interested in 14 carlots of such onions and thereupon the following carlots of onions were sold by Mr. Kosuga to Campbell Soup Company on March 19, 1956, for $180 per carlot, or a total of $2,515.20 (with allowances for shortages).

S 1317	48341	48466
48287	48346	48552
S 1364	73192	48615
73085	H 9792	H 9796
48321	48619	

An additional 8 carlots of such onions were sold by other onion brokers under instruction from Mr. Kosuga and the following prices realized as reported to affiant:

Carlot Number	Price per Carlot
73157	$ 55.00
48461	178.80
H 9882	90.00
48432	65.00
48643	120.00
H 9819	75.00
H 9910	45.00
H 9856	60.00
Total	$688.80

The remaining 15 carlots of onions had deteriorated in condition, could not be sold and were abandoned.

[fol. 42] The total realized by Vincent W. Kosuga in the liquidation of said 37 carlots was $3,204.00.

Further affiant sayeth not.

/s/ Don R. Black.

Subscribed and sworn to before me this 20 day of August, A. D. 1957.

/s/ Lilyan Fisher (Seal)
Notary Public.

IN UNITED STATES DISTRICT COURT

ANSWER TO MOTION FOR SUMMARY JUDGMENT—
Filed September 11, 1957

Now comes the defendant, Jack H. Kelly, by his attorney, Joseph W. Louisell, and for his answer to the motion for summary judgment heretofore filed, shows unto this honorable court as follows:

While counsel for the defendant respectfully, but vigorously, disagrees with the conclusion reached by this honorable court at pages 7 and 8 of its memorandum opinion of April 24, 1957 that the so-called "non-delivery" condition of the contract was not an unlawful restraint of trade or manipulative device but rather was a reasonable restriction to assure the defendant of the enjoyment of the legitimate fruits of his contract of purchase, assuming that this honorable court was correct in reaching such a conclusion of law, this defendant is entitled to a trial by jury of the factual issues raised by the allegations in the counterclaim of the defendant and denied in the reply filed by the plaintiff, said factual issues being:

1. Whether the plaintiff breached the so-called "Non-delivery" provisions of the contract by selling large numbers of futures contracts of onions on the Chicago Mercan-

tile Exchange during that portion of the 1955-1956 trading season subsequent to December 17, 1955 and whether the plaintiff did further breach the provisions of the so-called [fol. 43] "non-delivery" contract by delivering unusual quantities of onions on the cash market or by selling onions in the country below the prevailing price during that portion of the 1955-1956 trading season subsequent to December 17, 1955.

2. The extent of the damages suffered by the defendant as the result of the breach by the plaintiff of the provisions of the so-called "non-delivery" condition of the contract.

/s/ Joseph W. Louisell, Attorney for the Defendant,
2366 Penobscot Building, Detroit 26, Michigan.

Dated: September 10, 1957.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of Michigan,
County of Wayne—ss.

Joseph W. Louisell being first duly sworn, deposes and says that he is one of the attorneys of record for the defendant, Jack H. Kelly, in the above entitled cause.

Affiant does further say that while it is his considered professional opinion that this honorable court erred in its memorandum opinion of April 24, 1957 when it concluded that the so-called "non-delivery" condition of the contract was not an unlawful restraint of trade but rather was a reasonable restriction to assure the defendant of the enjoyment of the legitimate fruits of his contract of purchase, assuming that this honorable court was correct in reaching such a conclusion of law, it is the considered professional opinion of the affiant that the plaintiff is not entitled to a summary judgment dismissing the defendant's counterclaim in which the defendant seeks damages against the plaintiff for an alleged breach of the so-called "non-delivery" condition of the contract for the reason that material [fol. 44] issues of fact exist as to whether the plaintiff did breach the provisions of the so-called "non-delivery" con-

dition of the contract and whether the defendant suffered any damages as the result of the alleged breach of the contract as aforesaid.

Affiant further states that in view of the provisions of Sub-section c of Rule 56 of Federal Rules of Civil Procedure, the plaintiff is not entitled to a summary judgment since there remains unresolved certain issues of fact which must be determined by the jury.

/s/ Joseph W. Louisell

Subscribed and sworn to before me this 10th day of September, 1957.

Eileen M. Mahoney, Notary Public, Wayne County, Michigan. My commission expires February 14, 1959.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF VINCENT W. KOSUGA—
Filed September 20, 1957

Vincent W. Kosuga, being duly sworn, deposes and says:

That he resides in Pine Island, Orange County, New York and is the plaintiff in the above entitled action.

1. That deponent did not, during the term of the contract, subsequent to December 17, 1955, speculatively sell any onion contracts on the Chicago Mercantile Exchange. That all sales made were hedges against actual cash onions then owned by the deponent, Vincent W. Kosuga.

2. That during said period, subsequent to December 17, 1955 and to the end of February, 1956, deponent, Vincent W. Kosuga, made no deliveries of onions on the Chicago Mercantile Exchange.

3. That during the period subsequent to December 17, 1955 and for the balance of the 1955 and 1956 season, all [fol. 45] onions sold by the deponent, Vincent W. Kosuga, in the country, were at all times sold at prevailing market

prices for cash onions at the time of the sale and not below such prevailing market prices.

/s/ Vincent W. Kosuga

Sworn to before me this 12th day of September, 1957.

Michael A. Gurda, Notary Public in the State of New York, Orange County No. 250. Commission expires: March 30, 1959.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed September 26, 1957

This cause coming on to be heard upon the complaint of the plaintiff, the amended answer of defendant as modified by an order entered August 15, 1957 striking certain affirmative defenses, the counterclaim of defendant, the plaintiff's reply to the amended answer and answer to the counterclaim, the motion of plaintiff for a summary judgment with supporting affidavits and the answer to said motion filed by defendant, and the Court, having considered the facts admitted by the pleadings, the affidavits filed and the arguments of counsel, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Vincent W. Kosuga, plaintiff herein, is a citizen of the State of New York, and Jack H. Kelly, defendant herein, is a citizen of the State of Illinois. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

[fol. 46] 2. On or about December 17, 1955, defendant purchased and plaintiff sold fifty (50) cars of U. S. No. 1 Grade Yellow Globe Onions in Chicago storage at $960.00 per car for a total of $48,000.00, plus storage charges incurred after such sale. The terms of said purchase and sale required an initial cash payment of $300.00 per car, or $15,000; a second payment by January 10, 1956 of $200.00 per car, or $10,000; and the balance of $460 per car, or

$23,000, plus storage charges incurred, to be paid when defendant ordered the cars of onions released from storage.

3. As a condition of said purchase and sale, plaintiff agreed that he would not deliver the remainder of his holdings of cash onions on futures market during the current onion season, but instead, would merchandise such onions in normal trade channels.

4. Defendant has only made the following payments to plaintiff:

On December 22, 1955	$7,500
On January 18, 1956	5,000

These payments do not fulfill the terms of payment required by the purchase and sale agreement. Defendant has not complied with the obligations imposed by said agreement.

5. Storage charges in the amount of $5,052 have been incurred by the plaintiff, which according to the agreement is an obliagtion (sic) of the defandant.

6. On or about February 7, 1956, thirteen (13) cars of said onions purchased were withdrawn from storage by defendant and sold.

7. The onions purchased by defendant are perishable agricultural commodities which may be stored only for a reasonable period of time. On February 16, 1956, plaintiff advised defendant that the onions purchased were showing deterioration and demanded that defendant withdraw said onions from storage and make full payment therefor.

[fol. 47] 8. On or about March 9, 1956, defendant repudiated his agreement of purchase. Plaintiff thereupon used his best efforts to mitigate the damages involved by selling and disposing of said onions for the account of defendant. There was realized from the liquidation of the remaining 37 cars of onions purchased by defendant the amount of $3,204.

9. The balance due plaintiff under said contract of purchase is $37,342, computed as follows:

Purchase Price		$48,000.00
Storage Charges		5,082.00
		$53,082.00
Less:		
Adjustment on account of shortage	$ 35.20	
Amount paid by defendant	12,500.00	
Amount realized by plaintiff in liquidation of onions for account of defendant	3,204.00	15,739.20
Total remaining due		$37,243.80

10. Defendant filed a counterclaim asserting that he had fulfilled all of his obligations under the purchase and sale agreement but that plaintiff breached his contract by selling large quantities of onion futures, delivering large quantities of onions on the futures market and selling cash onions in the country below established prices. An affidavit was filed by plaintiff specifically denying these asserted breaches of contract. Defendant has admitted in his amended answer that he has breached the terms of the contract by failing to make the initial cash payment of $15,000 and a second payment by January 10, 1956 of $10,000.

[fol. 48] CONCLUSIONS OF LAW

A. This Court has jurisdiction of the parties and of the subject matter herein by virtue of Section 1332 of the Judicial Code, Title 28 U. S. C. §1332.

B. There is no genuine issue as to any material fact involved in this controversy.

C. This is an action to enforce payment for goods sold to and received by defendant at a fair and reasonable price. The total amount due of $37,342.80 is undisputed.

As part of the purchase and sale agreement, plaintiff agreed not to deliver the remainder of the onions he owned on the futures market, but to merchandise them in normal trade channels. This condition was a reasonable restriction to assure defendant the enjoyment of the legitimate fruits of his contract of purchase. The agreement was valid and enforceable. Judgment will be entered in favor of plaintiff and against the defendant in the sum of $37,042.80 with interest at 5% from the date of judgment, together with costs.

D. Defendant has violated the terms of the purchase agreement by failing to make the initial payment when entering into the agreement and by failing to make the second payment on January 10, 1956. Defendant, having first breached the agreement, may not now counterclaim that plaintiff subsequently did not adhere to a condition of the contract. Furthermore, the counterclaim charges alleged breaches of conditions which were not part of the agreement between the parties as that agreement is defined in the complaint, amended answer and reply of the parties. The counterclaim of the defendant must be dismissed.

It is so ordered and counsel for plaintiff will submit an appropriate judgment order in accordance herewith.

Igoe, United States District Judge.

Dated: September 26, 1957.

[fol. 49]

IN UNITED STATES DISTRICT COURT

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed October 11, 1957

Now comes the defendant, Jack H. Kelly, by his attorneys, Joseph W. Louisell and Richard E. Gorman, and for his objections to the proposed findings of fact and conclusions of law shows unto this Honorable Court as follows:

1. The defendant objects to proposed findings of facts 2, 3, 4, 8, 9 and 10 for the following reasons:

a. The files and records in the instant cause, including the various pleadings and affidavits, in no way support any of the above enumerated proposed findings of fact, but, to the contrary, said papers indicate that the above enumerated proposed findings of fact are totally erroneous, inaccurate and incomplete.

b. The Court, in granting a motion for a summary judgment, is not obligated to make any findings of fact whatsoever under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure.

2. The defendant objects to proposed conclusions of law B, C, and D for the following reasons:

a. Proposed conclusions of law B, C, and D are predicated upon a gross misconception of the pertinent and applicable law governing the issues involved in the instant cause.

b. The Court, in granting a motion for summary judgment, is not obligated to make any conclusions of law whatsoever under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure.

/s/ Joseph W. Louisell, 2366 Penobscot Building, Detroit 26, Michigan; /s/ Richard E. Gorman, 1 N. LaSalle Street, Chicago, Illinois, Attorneys for Jack H. Kelly, Defendant.

Dated: Chicago, Illinois, October 11, 1957.

[fol. 50]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND GRANTING MOTION FOR SUMMARY JUDGMENT—October 11, 1957

You are hereby notified that Judge Igoe entered the following order on 10-11-57:

1. On his own motion, defendant given leave to file objections to Findings of Fact and Conclusions of Law instanter and said objections are overruled.

2. Enter Judgment order allowing plaintiff's motion for Summary Judgment. Enter Judgment in favor of plaintiff and against defendant in the sum of $37,342.80 with interest and costs. Execution to issue. Defendant's counterclaim is dismissed.—Draft.

Roy H. Johnson, Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 22, 1957

Notice is hereby given that Jack H. Kelly, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit, from the order dated October 11, 1957, granting plaintiff's motion for a summary judgment against the defendant in the sum of thirty-seven thousand, three hundred forty-two and eighty/hundredths ($37,342.80) dollars, with interest and costs, and dismissing the counterclaim of the defendant.

/s/ Joseph W. Louisell, 2366 Penobscot Building, Detroit 26, Michigan; /s/ Richard E. Gorman, 1 N. LaSalle Street, Chicago, Illinois, Attorneys for Defendant.

[fol. 51]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12190

September Term, 1957, April Session, 1958

VINCENT W. KOSUGA, Plaintiff-Appellee,

v.

JACK H. KELLY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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Before Major, Schnackenberg and Parkinson, Circuit Judges.

OPINION—June 23, 1958

Major, Circuit Judge. This is an appeal from a summary judgment in favor of appellee (plaintiff) against appellant (defendant), entered October 11, 1957, in the amount of $37,342.80, with interest and costs. The action was commenced September 11, 1956, and the judgment represents the balance due on a sale made December 17, 1955, by plaintiff to defendant, of fifty cars of onions.

If plaintiff was entitled to recover, there is no dispute as to the amount due as embodied in the judgment. The issues raised on this appeal require a statement of the salient facts which give rise thereto, as well as the essential proceedings in the District Court. The case was tried and decided upon the pleadings, which included plaintiff's complaint, defendant's answer thereto, certain affirmative defenses asserted by defendant, as well as a counterclaim

[fol. 52] by which defendant sought to recover damages against plaintiff in the amount of $75,000. There was submitted in connection with the counterclaim an affidavit by each of the parties.

On December 17, 1955, when the contract in dispute was made, plaintiff and his associate, Sam Siegel (the latter not a party to this action), were owners of actual onions in Chicago and elsewhere. Defendant was a grower of onions. Both parties were engaged in the marketing of onions in Illinois and in commerce generally throughout the country. By the terms of the contract plaintiff agreed to sell and defendant agreed to purchase fifty cars of onions at $960.00 per car, plus storage charges, or a total of $48,000; plus storage charges. The terms of sale were: initial cash payment, $300.00 per car, or $15,000; second payment to be made by January 10, 1956, of $200.00 per car, or $10,000; the balance of $460.00 per car, plus storage to be computed at the time defendant ordered the cars withdrawn from storage, or a total of $28,082.00. From time to time, defendant withdrew from storage thirteen cars of onions. The payments made by defendant consisted of $7,500 on December 22, 1955, and $5,000 on January 18, 1956, or a total payment of $12,500. No further payments were made as provided for in the agreement or for the thirteen cars of onions withdrawn by defendant from storage.

Onions, due to their perishable nature, can be kept in storage only for a reasonable period. On February 16, 1956, plaintiff sent a telegram to defendant, as follows:

> "Storage onions you purchased from me on 12-17-55 now showing deterioration. You agreed to order out of Chicago storage and pay for these onions during January and early February 1956. Present condition of onions require immediate action. Demand payment by 2-20-56 and will surrender negotiables upon receipt of payment."

On the same date, plaintiff wrote defendant, which in general was confirmatory of the telegram. On February 20, 1956, defendant responded by telegram, as follows:

"Our agreement does not provide that onions be withdrawn from storage in substantial quantity by early February. We intend to abide by the original agreement and we expect you to do likewise."

[fol. 53] Defendant, on March 9, 1956, notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. The reasons for such refusal will be subsequently noted under defendant's affirmative defenses.

The facts so far stated are conceded by defendant. In connection therewith it is pertinent to note that defendant makes no contention, either by allegation or otherwise, but that the price which he agreed to pay for the onions was the fair and reasonable cash market price. For reasons asserted in the affirmative defenses, defendant contends that payment of the balance due on the contract cannot be judicially enforced. Such defenses are predicated upon an alleged factual situation from which it is argued that there was incorporated in and made a part of the sale agreement certain conditions in violation of anti-trust laws; both Federal and State (Illinois), as well as the Commodity Exchange Act. These affirmative defenses were, on motion of plaintiff, stricken by the court. We need cite no authority for the well established rule that all facts well pleaded must be taken as true. This is so even though plaintiff by answer has in large part denied defendant's allegations.

We find it difficult, as is often the case under similar circumstances, to separate facts well pleaded from those of a conclusory and argumentative nature. It appears, however, that the essential allegation of fact is that referred to as the non-delivery provision asserted to have been made at the same time and in connection with the sale of the onions. It appears from the briefs that each of the parties recognizes this provision as furnishing the principal bone of contention. Relative thereto, it is stated in defendant's brief that it was agreed by the parties that "the plaintiff and Sam Siegel would not deliver any onions on the futures market for the balance of the 1955-1956 trading season" (referring to onions owned and controlled

by plaintiff and Siegel other than those involved in the sale to defendant), and that the defendant and other onion growers "agreed to purchase the 287 carloads of onions [this includes the 50 cars purchased by defendant] and to desist from selling them upon the futures market for the balance of the trading season in consideration of the [fol. 54] promise of the plaintiff and Sam Siegel not to deliver any of the onions owned, held or controlled by them on the futures market for the balance of the 1955-1956 trading season."

It is alleged as a legal conclusion, "The avowed and express object of said agreement was to fix the price of onions and limit the amount of onions sold in the State of Illinois, to fix and manipulate the market price of onions and to stabilize said price and, if possible, to increase their price, said onions being a part of interstate commerce, and to create a false and fictitious market condition." In connection with this non-delivery provision, it is pertinent to note that each of the parties remained free to merchandise onions in normal commercial trade channels.

The District Court in a memorandum opinion reasoned that the Sherman Anti-Trust Act could not be asserted as a defense to the action for the unpaid balance of the purchase price, principally upon three grounds: (a) the so-called condition of non-delivery was not an inherent part of the sale and, thus, assuming the reciprocal agreement not to sell onions on the futures market during the balance of the 1955-1956 trading season was illegal, the obligation of defendant to pay was supported by other lawful consideration, to-wit, plaintiff's promise to sell the fifty carloads of onions at an agreed price; (b) the remedies provided by the Sherman Anti-Trust Act are exclusive and do not afford defendant the affirmative defense asserted, and (c) the so-called condition of non-delivery was not an illegal restraint of trade condemned by the Sherman Act.

In support of his position, plaintiff places great reliance upon *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, while defendant places equal reliance upon *Continental Wall Paper Company* v. *Louis Voight and Sons Company*, 212 U.S. 227. *Connolly* involved an action to recover the price

of sewer pipe sold and delivered to defendant. The defense asserted that plaintiff was part of a monopolistic conspiracy and combine for the express purpose of limiting production of sewer pipe and increasing the market price thereof, that the sale involved was at prices fixed by the monopoly in violation of the Sherman Act and, therefore, [fol. 55] unenforceable. The Court, in holding the defense not available, stated (page 551):

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

Continental involved an action to recover the alleged balance on an account for merchandise sold and actually delivered. Defendant as one of its defenses asserted that it, along with plaintiff and other corporations, was a party to an agreement, combination and conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act and that the contract of sale was an inherent part of the illegal scheme. The Court sustained the validity of the defense, with a dissenting opinion by four members. The Court at great length distinguished the *Connolly* case, and discussed the situation before it as a basis for a holding contrary to that of *Connolly*, concluding such discussion as follows (page 260):

> "In short, the defense in the *Connolly* Case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress."

In *Continental,* both plaintiff and defendant were admittedly members of a combination and conspiracy in [fol. 56] violation of the Anti-Trust Act. The Court emphasizes the particularly vicious nature of the violations in which the parties were engaged. As descriptive thereof the Court quotes from the Court of Appeals as follows (page 256):

> "'The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes.'"

After all is said and done, the essential distinction between *Connolly* and *Continental* is that in the former

plaintiff was engaged in a rather innocuous form of violation of the anti-trust laws to which defendant, as buyer, was not a party, while in *Continental* plaintiff was engaged in a vicious form of anti-trust violation and defendant, as buyer, was a party to plaintiff's unlawful activities. It is also important that in *Connolly* recovery was sought for the fair and reasonable price of goods sold, while in *Continental* recovery was sought for the price which resulted from and was determined by the terms of the conspiracy in which the parties were participants. In the former, defendant was not permitted to plead plaintiff's anti-trust violation as a defense, while in the latter the same defense asserted by defendant was sustained. Thus, these two cases, as defendant would have them [fol. 57] applied, lead to the incongruous result that a Court will lend its aid to enforce payment by a buyer innocent of wrongdoing but will deny its aid to enforce payment by a buyer who is a wrongdoer, that is, a party to and a part of a combination engaged in anti-trust violations. A reading of the cases subsequent to *Continental* demonstrates that the Court generally, while recognizing its rationale, have in the main limited the case to its particular vicious facts. Its application has been denied under a variety of circumstances.

In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, the Court rejected the defense of alleged violation of the Anti-Trust Acts. In doing so, we think it enlarged the doctrine of *Connolly* and at the same time limited that of *Continental.* The action was brought to recover the price of glucose sold to defendant. In defense it was claimed that plaintiff was part of a monopoly which had advanced the price of glucose and set up a profit-sharing plan under which purchasers were required to buy all of their requirements from the combine, thus restraining competition in violation of the Sherman Act. The contract of sale permitted the purchaser to share in a profit-sharing plan of the seller, on condition that the purchaser use the seller's glucose exclusively. It was specifically provided in the contract for sale, "Goods herein sold are for your own consumption and not for resale." Thus, defendant (buyer) was by agreement with plaintiff (seller)

restricted in its right to purchase as well as in the use of the purchased product.

The Court affirmed the action of the lower Court in striking the answer as being no defense, affirmed judgment for the price of the goods sold, and stated (page 172):

> "* * * the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might pos- [fol. 58] sibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 46 L.Ed. 679, 22 Sup.Ct.Rep. 431, applying them to the identical general question here involved."

The Court continued (page 172):

> "The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions."

In *Wilder*, the *Continental* case was relied upon in support of the defense, as it is here. Relative thereto, the Court stated (page 177):

"But it is apparent on the face of the opinion in the *Continental Wall Paper* Case that it affords no ground for the extreme and contradictory conclusion thus deduced from it since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale."

[fol. 59] It seems to us that the reasoning of the Court in *Wilder*, and particularly the appraisement which it made of its former opinion in *Continental*, is highly pertinent to the instant situation. Here, as in *Wilder*, there was a contract of sale. Plaintiff was to receive and defendant was to pay the fair market value of the onions. Assuming that which we think doubtful, that is, that the non-delivery agreement was illegal, there is no more reason here than there was in *Wilder* for importing such elements of wrong into an otherwise legal and valid contract. More than that, the instant action is not to enforce the non-delivery provision but to enforce defendant's promise to pay. Such enforcement, as stated in *Wilder* (page 177), will not "sanction and give effect to a violation of the Anti-Trust Act inhering in the sale." This principle has been reaffirmed in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743. In that case it was stated (page 755) that the Court would entertain a defense that the contract is illegal only where the suit "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought. * * *." See also *United States Hoffman Machinery Corp.* v. *Valeteria Cleaners, Inc.*, 143 F. Supp. 797, 799.

Defendant challenges and seeks to distinguish the cases which we have discussed by arguing that the non-delivery

provision of the contract was an integral part thereof, in other words, that because of such provision the entire contract is tainted with illegality and no part of it is enforceable. We do not agree with the premise upon which this contention rests. The non-delivery provision, while a part of the same contract, is separable from and not inherent in defendant's promise to pay the reasonable market price for the onions. A case in point is *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co.* v. *Bay*, 200 U.S. 179. In that case, the Court separated the legal from the illegal covenant and enforced the lawful promise made for adequate consideration even though an unlawful promise was made at the same time for the same consideration. In reference to one facet of the unlawful portion of the contract which appears to have been a price fixing condition, the Court stated (page 185):

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant [fol. 60] sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground."

Defendant also relies upon the Commodity Exchange Act (7 U.S.C. Par. 5, 13). It is contended that the contract in suit is in violation of that Act on the basis that the non-delivery provision created a "false and fictitious" market condition in onions by manipulation and increase in price. The contention with reference to this Act parallels that relative to the Federal Anti-Trust Act. Our discussion in connection with that Act is equally pertinent. In our judgment, and we so hold, the affirmative defenses predicated upon the Federal Anti-Trust Act and the Commodity Exchange Act are not available to defendant and such defenses were properly stricken by the District Court.

Defendant as a further affirmative defense also relies upon the Anti-Trust Act of Illinois (Chap. 38, Sec. 569, *et seq.*, Smith-Hurd Illinois Ann. Stat.). Section 573 de-

clares that any contract or agreement in violation thereof shall be absolutely void. Section 574 provides that a purchaser of a commodity contrary to the provisions of the Act may plead the Act as a defense to any suit for the recovery of such price. Thus, the Illinois Act, unlike the Federal Act, specifically provides that a violation of the Act may be pleaded as a defense. The Illinois Act as the substantive law of the State is applicable only to intrastate commerce. Defendant apparently so recognizes and argues that such commerce was involved inasmuch as the contract of sale was made and was to be performed in the State of Illinois. Defendant makes this argument in spite of the frequent allegations in his pleadings that "said onions which were the subject of said agreement and contract were a part of interstate commerce." In 15 C.J.S. Sec. 133 (b), it is stated that "state anti-trust laws do not apply to transactions involving interstate commerce * * *." It is hardly open to doubt but that the transaction in issue involved interstate commerce. It is, therefore, our view that the Illinois Act is without application.

[fol. 61] Furthermore, the Illinois provision which makes a violation available as a defense has been narrowly construed by this Court. *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 Fed. 491. We held that the defense could not be raised in an action for the recovery of the purchase price of goods where it was not sought to enforce the illegal condition. We reasoned that the illegal covenant should, where possible, be separated from the valid promise to pay for the goods sold. As already shown, the Federal Courts have permitted recovery based upon the same reasoning.

We may add that a reading of the Illinois cases is convincing that the transaction in dispute is not violative of the Illinois Act, even though its applicability be assumed. In *Match Corp. of America* v. *Acme Match Corp.*, 285 Ill. App. 197, 204, the Court stated:—

> "All contracts which on their face place a restriction upon the acts of the other party to the contract are necessarily a restraint to a certain extent. If the effect does not destroy competition and is merely intended

to increase the business of the parties to the contract, and is only incidental to and found necessary in order to protect the parties' interest as set forth in the contract and does not tend to promote a monopoly, such provisions do not make the contract illegal and void."

See also *Moody & Waters Co.* v. *Case-Moody Pie Corp. et al.*, 354 Ill. 82, and *Southern Fire Brick and Clay Co.* v. *Garden City Sand Co. et al.*, 223 Ill. 616.

Lastly, defendant contends that its counterclaim was improperly dismissed. In this claim it was alleged that plaintiff violated the non-delivery provision of the contract by delivering onions on the futures market during the balance of the 1955-1956 trading season and that plaintiff disrupted the cash market of onions by selling and delivering unusual quantities below the prevailing price. The counterclaim does not allege when this alleged breach on the part of plaintiff took place. Plaintiff in support of his denial of a breach submitted an affidavit which accounted for the fifty carloads contracted for by defendant. The affidavit shows that on or about February 7, 1956, thirteen car- [fol. 62] loads were withdrawn from storage by defendant; March 19, 1956, fourteen carloads were sold by plaintiff to Campbell Soup Company, and at a later date eight carloads were sold for cash to other onion brokers, leaving in storage fifteen carloads which had deteriorated to the extent that they could not be sold and were abandoned. Neither the manner of disposal of these onions by plaintiff nor the time is disputed by defendant.

The short and fatal answer to defendant's contention is that he first breached the contract. As heretofore shown, defendant agreed to an initial cash payment of $15,000, and a second payment of $10,000 by January 10, 1956. However, the total payment made by him was $12,500. Thus, defendant was in continuous default and breach of the contract from and after January 10, 1956. It is a well established principle that a party to a contract who commits the first breach of its terms cannot maintain an action for a subsequent breach by the other party. *Realty Acceptance Corp.* v. *Montgomery*, 51 F.2d 636, 640;

Raybestos-Manhattan, Inc. v. *Asbestos Textile Co. et al.*, 79 F.2d 634, 637; *Sonken-Galamba Corp. et al.* v. *Butler Iron & Steel Co.*, 119 F.2d 283, 286. Moreover, it must be remembered that on March 9, 1956, defendant notified plaintiff that he would withdraw no further onions from storage and that he would make no further payments. At that time plaintiff was charged with the obligation of disposing of the onions at the best price available in mitigation of damages sustained by reason of defendant's breach. There is no allegation in the pleadings or affidavits that plaintiff acted improperly in the discharge of this obligation. In fact, as noted, plaintiff's affidavit, which is not denied, demonstrates that the onions (other than the thirteen cars for which delivery was accepted by defendant) were disposed of by plaintiff subsequent to the time when defendant refused to accept further delivery, and that defendant was given credit for the amount so realized. In our view, defendant's counterclaim failed to state an action upon which he was entitled to relief, and the claim, together with the answer thereto and affidavits submitted by the parties, demonstrates that there was no material issue of fact raised or involved.

[fol. 63] In our judgment and we so hold, the District Court committed no error in striking the affirmative defenses pleaded by defendant or in dismissing his counterclaim. The judgment appealed from is

Affirmed.

[fol. 64]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before:

HON. J. EARL MAJOR,
HON. ELMER J. SCHNACKENBERG,
HON. W. LYNN PARKINSON,

Circuit Judges.

No. 12190

VINCENT W. KOSUGA, Plaintiff-Appellee,

vs.

JACK H. KELLY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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JUDGMENT—June 23, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed with costs, and interest from the date of judgment of the said District Court until paid, at the same rate that similar judgments bear in the courts in the State of Illinois.

[fol. 65] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 66]

SUPREME COURT OF THE UNITED STATES

No. 267, October Term, 1958

JACK H. KELLY, Petitioner,

vs.

VINCENT W. KOSUGA.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.